

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JASON FARRELL McGEHEE

PETITIONER

v.

No. 5:03-cv-143-DPM

WENDY KELLEY,* Director,
Arkansas Department of Correction

RESPONDENT

ORDER

McGehee's motion to reconsider is denied. Unlike the claim in *Panetti v. Quarterman*, 551 U.S. 930 (2007), McGehee's claim – that the death penalty is categorically unconstitutional – was ripe and available when he filed his habeas petition. The contours of the claim look different today than they would have then. But as the Supreme Court noted in an abuse-of-the-writ case, the fact that "evidence discovered later might also have supported or strengthened" McGehee's claim doesn't save it. *McCleskey v. Zant*, 499 U.S. 467, 497–98 (1991). And McGehee can't avoid this conclusion through careful issue framing.

McGehee's Rule 60(b) motion is, "if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it to the same

*Wendy Kelley is the current director of the Arkansas Department of Correction. The Court directs the Clerk to amend the docket.

requirements would be 'inconsistent with' the statute." *Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005) (quoting 28 U.S.C. § 2254 and Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts). He therefore needs permission from the Court of Appeals to proceed. 28 U.S.C. § 2244(b). In light of *Gonzalez*, this isn't a matter about which reasonable jurists could disagree.

Motion to reconsider, No 52, denied.

So Ordered.

D.P. Marshall Jr.
D.P. Marshall Jr.
United States District Judge

18 September 2015